

## ***5 Official Opinions of the Compliance Board 130 (2007)***

### **EXCEPTIONS PERMITTING CLOSED SESSION – LEGAL ADVICE, §10-508(a)(7) – LEGAL RAMIFICATIONS OF NEGOTIATION, WITHIN THE EXCEPTION – POLICY ASPECTS OF NEGOTIATION, OUTSIDE THE EXCEPTION**

March 15, 2007

*Rob Walters, City Editor  
The Frederick News-Post*

The Open Meetings Compliance Board has considered your complaint that the Frederick County Board of Education (hereafter “County Board”) violated the Open Meetings Act on a number of occasions, when it closed sessions under the Act’s “legal advice” exception but then engaged in discussions that exceeded the bounds of the exception.

As we explain below, the limits of this exception can be described generally but are difficult to apply in this case. On the one hand, the County Board was entitled to close its sessions under the Act for the purpose of receiving *legal advice* from its counsel about all aspects of a proposed agreement with a developer. On the other hand, merely because the lawyer was handling all of the negotiations on its behalf, the County Board was not free to use this exception to discuss *policy issues* about the deal in secret. We do not know whether this line was crossed.

## **I**

### **Complaint and Response**

The complaint, filed on behalf of the *Frederick News-Post*, alleged that the County Board closed at least four meetings under the exception authorizing a public body to close a meeting for the purpose of “consult[ing] with counsel to obtain legal advice,” §10-508(a)(7),<sup>1</sup> but then conducted discussions beyond the permissible bounds of the exception. The sessions involved a deal under which a developer could proceed with a residential development, by means of a zoning text amendment by the Frederick County Board of Commissioners and a waiver of the County’s Adequate Public Facilities Ordinance; in exchange, the developer would pay an

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<sup>1</sup> All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

estimated \$70 million toward school construction costs.<sup>2</sup> According to the complaint, the waiver, approved by the County Commissioners in April 2005, tasked the County Board with negotiating with the developer. The complaint noted many sessions since May 2006, closed pursuant to §10-508(a)(7) in connection with these negotiations, and identified sessions held on July 12, August 30, September 27, and November 8, 2006, as “particularly troubling.” The complaint attached copies of draft minutes of regular meetings of the County Board, which in turn provided summaries of closed sessions. These, according to the complaint, evidenced that “discussions seem to have gone beyond simply the rendering of legal advice.”

In a timely response on behalf of the County Board, Ronald Miller, Esquire, denied that the Act was violated. The response indicated that he would “specifically address the broader purpose of each of the identified closed sessions without breaching the attorney/client privilege, or divulging the very information for which the Open Meetings Act allows protection.” According to the response, discussions during the closed sessions were limited to issues of a legal nature relating to negotiations between the County Board and the developer. “[A]s the attorney who was advising the Board of Education on all matters as it related to the identified closed sessions,” Mr. Miller wrote, “I would affirm that each meeting identified involved me [*sic*] giving advice to the Board on a very volatile and controversial matter it faced ... as it sought to negotiate a potential agreement with a land developer ... in the estimated range of 65 million - 70 million dollars.”

As counsel to the County Board, Mr. Miller handled the negotiations with the developer. He stated that aspects of his advice included “various legal requirements, and the advisability of certain negotiating tactics, parameters, contract requirements, financial requirements to be imposed, and numerous other issues involving the negotiation ....” The response indicated that, during each session at issue, Mr. Miller “lead discussion ... on the various legal issues, negotiating options, analysis of proposals, and consideration of possible proposed terms and conditions for the redrafting of an agreement that would be protective of the Board’s interests .... [D]iscussions strictly pertained to negotiating parameters and specifics of the contract and its perceived requirements.” As for the need for confidentiality, the response noted that “[t]o simply provide the [d]eveloper our negotiating strategy and confidential due diligence analysis of the proposals would have been legally and economically disadvantageous, unwise for the Board and frankly indefensible in legal negotiations of this magnitude.”<sup>3</sup>

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<sup>2</sup> The Board of County Commissioners is not a party to the complaint.

<sup>3</sup> The response indicated that part of the negotiations, which addressed numerous proposed contract modifications over many months, also involved real estate acquisition. As of the date of the response, a final contract had not yet been prepared.

The response went on to summarize Mr. Miller's role during the four sessions particularly in question:

- July 12: legal advice rendered on the developer's proposal and "the pros, cons, and vulnerabilities regarding specific terms and conditions of the proposal."
- August 20: "specific advice regarding confidentiality of records ... and [an] update pertaining to on-going contract negotiations." At this meeting, Mr. Miller also "sought further direction as their attorney regarding parameters for specific contract terms the Board Members sought [*sic*] advisable, based upon my advice."
- September 27: "an update regarding negotiations ... and specific answers to legal questions and legal issues they had asked me to research from a previous closed session. We also had discussion regarding potential legal risks and benefits of entering into a contractual agreement with [the developer]. We also discussed new, current and altered legal strategy in negotiating specific terms and conditions ...."
- November 8: communicating to the County Board the developer's "response to the Board's previously identified parameters ...."<sup>4</sup>

## **II**

### **Discussion**

#### ***A. Preliminary Matter: Lack of Information***

We are limited in our ability to analyze the particulars of each meeting identified in the complaint due to the generality of the County Board's response. In submitting the complaint to the County Board, we requested documentation that would assist in our review. *See* §10-502.5(c)(2)(ii). The County Board did not submit the minutes of the closed sessions, documentation it must maintain under the

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<sup>4</sup> The complaint had indicted that "it is incumbent on the [County Board] to explain in greater detail ... why the closed sessions of May 10 and August 9... were necessary ...." Presumably because it was unclear whether the complaint was also alleging violations on these dates, the County Board did not directly address these sessions in its response. Therefore, we shall limit our discussion to the four sessions identified above.

Open Meetings Act. §10-509(b). Had it done so, and depending on the level of detail in the minutes, perhaps our review might have been more focused.<sup>5</sup> As it is, we are only able to discuss the issue without resolving it. *See* §10-502.5(f)(2).

**B. Legal Advice Exception**

Subject to the Act's procedural requirements, a public body is entitled to close a meeting in order to "consult with counsel to obtain legal advice." §10-508(a)(7).<sup>6</sup> This and similar exceptions in other states' "sunshine" laws involve what one commentator described as "significant competing policy considerations. On the one hand, public entities should not be disadvantaged in legal disputes. Public entities need to make full disclosure of relevant facts to counsel and receive candid evaluations of law and facts from counsel; neither is possible when the adversary sits in the front row to listen in. On the other hand, the attorney-client exception ... must not be expanded beyond its necessary minimum ... or ... provide a pretext for secret consultations ..." Ann Taylor Schwing, *Open Meetings Laws* 402 (1994).

While the term "legal advice" is not defined in the Act, it is generally understood to mean an attorney's "interpretation and application of legal principles to specific facts in order to guide future conduct." 4 *OMCB Opinions* 58, 59 (2004), *citing* P. Rice, *Attorney-Client Privilege in the United States* §7:9 (2d ed. 1999). To be sure, in interpreting §10-508(a)(7), we have not tied its application to the technicalities of whether an attorney-client privilege might exist. 5 *OMCB Opinions* 33, 40 (2006). Like all the exceptions under §10-508(a), however, §10-508(a)(7) is to be strictly construed. §10-508(c). We have consistently advised that this exception extends only to the interchange between a client public body and legal counsel in situations where the client seeks legal advice and the attorney provides it. *See, e.g.,* 1 *OMCB Opinions* 53, 54 (1993). It does not allow a closed meeting merely because an issue has legal ramifications. *Id.* The two prior Compliance Board opinions cited in the County Board's response, 3 *OMCB Opinions* 293 (2003) [Opinion 03-8] and 4 *OMCB Opinions* 58 (2004), are consistent with these principles.

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<sup>5</sup> Had the minutes of the closed meetings been submitted, we would have had more information about the closed sessions without compromising the confidentiality of the minutes. §10-502.5(c)(2)(iii).

<sup>6</sup> While the complaint suggested that a meeting ought not to be closed absent "genuinely sensitive" issues justifying closure, we have no basis for questioning a public body's decision to invoke the exception under the Act, provided the discussion remains within the confines of the exception and the procedural requirements of the Act are followed.

It is not unusual for an attorney to represent a client in negotiating a business transaction. While the attorney's legal skills might make the attorney an effective negotiator, the attorney is operating more as a business agent of the public body. *See, e.g., Rice, Attorney-Client Privilege in the United States* §7:22. In our view, when an attorney is functioning in this capacity and reports back on the negotiation, the attorney is not necessarily giving "legal advice" within the bounds of §10-508(a)(7).

An Arizona case illustrates the distinction. *Fisher v. Maricopa County Stadium District*, 912 P.2d 1345 (Ariz. App. 1995), involved the legality of a meeting closed under the following exception in that state's Open Meetings Law: "Discussion or consultation for legal advice with the attorney or attorneys of the public body." 912 P. 2d at 1352. The trial court had ruled that a meeting to hear their attorneys' report about negotiations with would-be owners of a baseball team was covered by this exception. The trial judge reasoned that "legal advice ... must mean ... an *unrestricted* discussion between attorneys and clients leading to the lawyers being able to carry out the clients' legal needs, even if mixed in those needs are the necessities of negotiating complex economic development contracts." *Id.* The appellate court rejected this reading of the exception as inconsistent with Arizona's rule of narrow construction for exceptions to the law's openness requirement: "We must take care not to interpret 'legal advice' so broadly as to frustrate the Open Meetings Law by allowing public bodies to delegate responsibilities to attorneys and then cloak negotiations ... in secrecy by having the attorneys present." 912 P.2d at 1353. The appellate court emphasized that the exception no longer justified a closed session after the public body had heard the lawyer's "advice concerning the legal ramifications of a commercial agreement. It is the debate over what action to take, including the pros and cons and policy implications, of competing alternative courses of action, that must take place in public." *Id.*

This is just the distinction that we believe marks the boundaries of the comparable "legal advice" exception in Maryland. The exception surely allows a public body's counsel, in closed session, to point out alternatives and to advise about the likely consequences if one approach were taken over another. The policy discussion about what to do, however, is not within this exception.

This reading of the law, we acknowledge, may be criticized as disadvantaging public bodies in a negotiation of this kind and pushing them toward, in Mr. Miller's disapproving phrase, "negotiation by leak or public pronouncements." The Open Meetings Act, however, does not contain an exception for negotiations as such. *See* 1 *OMCB* 233, 234 (1997). If such an exception is deemed desirable on policy grounds, the General Assembly should be asked to enact it. We are not going to create one through a lax interpretation of the "legal advice" exception.

***C. Meetings At Issue***

In the meetings at issue, the attorney was simultaneously representing the County Board by negotiating on its behalf with a developer and advising the County Board in connection with this matter. Based on Mr. Miller's representations, we have no doubt that much of his involvement involved offering legal advice. To the extent he was doing so, the County Board was entitled to close a meeting pursuant to §10-508(a)(7). Yet, in carrying out his role, he had to receive direction from his client. Even if that direction was based on his legal advice, the County Board was not entitled by §10-508(a)(7) to remain in closed session when discussing how Mr. Miller was to proceed. *See, e.g., 1 OMCB Opinions* 201, 203 (1997).<sup>7</sup>

The limited record before us does not allow us to decipher what occurred at the four closed sessions at issue and so reach a conclusion. We are troubled by the repeated mention in the County Board's response of "parameters." That word seems to imply decisive policy points – "If the developer won't agree to pay for X, no deal" – beyond the rendering of legal advice. But we know too little to reach a finding.

**III**

**Conclusion**

The County Board was entitled to close its sessions under the Act for the purpose of receiving legal advice from its counsel in connection with a potential agreement with the developer. If, however, at any point the sessions went beyond requests for legal advice, the rendering of it, and questions about it, the Act would have been violated. The record before us does not allow us to reach a decision.

OPEN MEETINGS COMPLIANCE BOARD

*Courtney J. McKeldin*

*Tyler G. Webb*

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<sup>7</sup> The County Board does not suggest that the County Board's involvement might have involved an administrative function. It appears to have been a quasi-legislative function, involving the process potentially leading to approval of a contract.